

STATE OF MICHIGAN
COURT OF APPEALS

In Re Genevieve Garcia Revocable Living Trust.

JAMES M STEFANEK,

Petitioner-Appellant,

v

ROBERT STEFANEK,

Trustee/Respondent-Appellee.

UNPUBLISHED

January 7, 2014

Nos. 309170 & 311123

Oakland Circuit Court

Family Division

LC No. 2007-310798-TV

Before: MURPHY, C.J., and CAVANAGH and STEPHENS, JJ.

PER CURIAM.

Petitioner appeals by right the trial court orders of summary disposition and payment of attorney fees in favor of respondent and the trial court orders denying petitioner reconsideration of both. For the reasons set forth below, this Court affirms the trial court's summary disposition, but remands the case for a redetermination of attorney fees.

I. BACKGROUND

On October 27, 2006, Genevieve Garcia established the Genevieve Garcia Revocable Living Trust (Trust). Petitioner and Respondent are two brothers, who are Garcia's nephews and named trust beneficiaries. Garcia and Respondent were designated as initial co-trustees with respondent to act as the first sole successor trustee upon Garcia's death. Garcia died on December 29, 2006.

On June 28, 2008, respondent sent petitioner an accounting of the Trust from December 29, 2006 through May 31, 2008. The accounting indicated that petitioner was to receive \$177,032.23, and that he had already received checks in the amount of \$161,000.00. Three years later, on June 23, 2011, petitioner filed a petition to remove respondent as the trustee alleging that respondent failed to pay petitioner his entitled amount and engaged in forms of self-dealing and fraud. On July 25, 2011, respondent countered that petitioner's petition was time barred because it was not brought within one year of the final accounting of June 28, 2008.

On November 1, 2011, respondent filed a motion to dismiss petitioner's petition. Respondent claimed that the Trust was terminated and all trust assets had been distributed. He also claimed that the petition was untimely filed and that respondent had complied with all of petitioner's requests for trust and tax documents. His motion further claimed that the petitioner had failed to timely file any amended petition specifying the "alleged acts of wrongdoing" resulting in respondent incurring unnecessary attorney fees and costs, and

[8.] (b) there simply is no merit to [petitioner's argument] that he was "shortchanged" in that [petitioner] apparently did not realize that the money which passed to him from the decedent outside of the trust would be taxable to the estate and that both the trust and EPIC provide for allocation of taxes among beneficiaries which include assets which pass outside the trust as well as trust assets.

On November 23, 2011, petitioner filed his first amended petition. It alleged that respondent had breached his fiduciary duty by improperly filing a Form 706 without the Schedule I which precluded petitioner from taking tax deductions to which he was entitled. The amended petition also alleged that respondent secured Garcia's signature on the Trust while she was hospitalized and dying and lacking the mental capacity to execute a trust through undue influence and fraud. Further, the petition alleged that the Trust did not reflect Garcia's wishes. Petitioner moreover, alleged that at the time the Trust was executed there existed a confidential/fiduciary relationship between Garcia and respondent by which respondent benefited, but did not describe it in more detail. The amended petition again requested that respondent be removed as trustee, that respondent be held personally liable, and attorney fees and costs be awarded.

On December 19, 2011, respondent filed his motion for summary disposition under MCR 2.116(C)(7), (C)(8) and (C)(10). Respondent argued that the claim of undue influence was time-barred because it was brought three years after the Trust's termination and legally barred by the doctrine of election. Respondent requested that the court dismiss petitioner's claims and also requested attorney fees and sanctions.

Petitioner filed his response to respondent's motion for summary disposition on January 5, 2012 which more fully developed the allegation of undue influence against respondent. He attached an affidavit from Garcia's accountant, Dennis Diebolt, who averred that he had spoken to Garcia about the need for a trust, and Garcia told him that she intended to leave petitioner and respondents equal shares. Diebolt also averred that he had referred Garcia to an attorney to draft a trust, but in the end, respondent's attorney Steven Stokfisz drafted the Trust. Petitioner argued that respondent influenced Garcia by having his attorney draft her trust and name him as a co-trustee and beneficiary. Moreover, that in Garcia's final months she had a degenerative eye disease and could not read without the aid of a special machine. Garcia signed the Trust while in hospice without the special reading aid. Therefore, petitioner believed that Garcia was at the "mercy of respondent . . . to read and explain the Trust to her."

On January 27, 2012, the court filed its opinion and order granting summary disposition. The court found grounds for summary disposition under MCR 2.116(C)(7), MCR 2.116(C)(8) and MCR 2.116(C)(10). MCR 2.116(C)(7) was appropriate because MCL 700.7604(1) barred an

attack to the validity of a trust that was filed more than two years after the settlor's death; MCL 700.7905 limited the commencement of breach of trust proceedings by a trust beneficiary against a trustee to one year after the beneficiary was sent a report adequately disclosing the existence of a potential claim for breach of trust and informed the trust beneficiary of the time allowed for the commencement of such proceeding; and the doctrine of election barred petitioner's claim because based on the various court proceedings, distributions, and final accounting, petitioner was on notice of any potential claims related to the validity of the Trust. The court acknowledged an exception to this doctrine for fraud, but stated that even if there was evidence of concealment, petitioner failed to tender the amounts distributed to him from the Trust prior to initiating the proceedings, thereby falling outside of this exception.

The court also held summary disposition appropriate under MCR 2.116(C)(8) because the trustee was only obligated by MCL 700.7814 to provide "a copy of the terms of the trust that described or affect the trust beneficiary's interest," and was not obligated to provide a copy of the entire trust agreement. Further, MCL 700.7814(1) did not require a trustee to keep qualified beneficiaries informed of material facts necessary to protect ancillary pecuniary interests; therefore, the trustee was not obligated to provide a copy of the Trust or estate tax returns. The court also noted that petitioner failed to explain how having a copy of the "Trust's Federal Income Tax Return" would prevent him from making an election for his tax purposes.

The court lastly found summary disposition established under MCR 2.116(C)(8). The court explained that pursuant to MCL 700.7814(2)(a) a trustee is not required to provide qualified trust beneficiaries a complete copy of the trust agreement and petitioner received 12 of the 17 pages of the trust agreement on June 4, 2007, which he made no objections to until June 23, 2011. Additionally, there was no requirement that a trustee provide a copy of the trust's tax returns to beneficiaries and petitioner failed to explain how failure to provide the Form 706 prevented petitioner from claiming income in respect of a decedent when he would have received a Form 1099R for the IRA distribution; hence there was no concealment. The court also held that it would grant respondent attorney fees and ordered respondent to file a bill of particulars.

On February 15, 2012, respondent filed his bill of attorney fees and costs, totaling \$44,634.05. Petitioner filed a Motion for Reconsideration on February 16, 2012 and objections to respondent's bill of attorney fees and costs on February 22, 2012. Petitioner asserted respondent failed to establish the reasonableness of his attorney fees because respondent merely attested that the fees were accurate and necessary.

On February 29, 2012, the court filed its opinion and order denying petitioner's Motion for Reconsideration. The court reasserted that the doctrine of election required a trust beneficiary to tender its share of trust assets back to the trust. It also determined a lack of any fiduciary relationship between Garcia and respondent prior to the drafting of the revocable trust.

An evidentiary hearing regarding the reasonableness of attorney fees was held on May 1, 2012, in response to petitioner's objections. Joseph Buttiglieri, respondent's expert witness, testified that the range of attorney fees for probate matters in Oakland County was approximately \$270 to \$600. Further, that respondent's counsel's hourly rate was reasonable and "on the low side for Oakland County." He also thought that the hours and effort applied were reasonable and necessary with the exception of respondent charging fees for fees. Buttiglieri based his opinion

on: (1) Rule 1.5 of the Michigan Rules of Professional Conduct; (2) the time and labor required; (3) the difficulty of the issues involved; (4) the requisite skills to perform the legal services; (5) the customary fees charged within the locality for similar services; (6) the amount in controversy; and (7) the experience, reputation, and ability of counsel. Accounting for the amount of fees inappropriately billed, Buttiglieri testified, the reasonable amount of attorney fees was approximately \$37,600 and with costs the total would be \$43,584.05.

After consideration of those factors enunciated in *Smith v Khouri*, 481 Mich 519; 751 NW2d 472 (2008), and the Michigan rules of professional conduct, the court held petitioner and petitioner's counsel jointly and severally responsible for costs and fees in the amount of \$43,584.05. Petitioner motioned the court for reconsideration of its ruling on May 12, 2012, and was denied without oral argument. The court declined to reconsider its holding.

II. SUMMARY DISPOSITION AND RECONSIDERATION

Petitioner raised a number of issues on appeal to challenge the trial court's grant of summary disposition and later denial for reconsideration. However, because the doctrine of election is dispositive we decline to discuss the other issues.

Appellate courts review "the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law. In making this determination, the Court reviews the entire record to determine whether defendant was entitled to summary disposition." *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

Equitable estoppel issues are also reviewed de novo. *AFSCME Int'l Union v Bank One*, 267 Mich App 281, 293; 705 NW2d 355 (2005). However, the trial court's factual findings will not be reversed unless they were clearly erroneous. *Id.*

Motions for reconsideration are governed by MCR 2.119(F). This Court reviews a trial court's decision to deny a motion for reconsideration for an abuse of discretion. *Churchman v Rickerson*, 240 Mich App 223; 611 NW2d 333 (2000); *In re Beglinger Trust*, 221 Mich App 273; 561 NW2d 130 (1997). An abuse of discretion occurs when the trial court's decision results in an outcome falling outside the range of principled outcomes. *Jilek v Stockson*, 297 Mich App 663, 665; 825 NW2d 358 (2012).

The trial court did not err in granting summary disposition to respondent, because petitioner's claims were barred by the doctrine of election. The doctrine of election, also termed the doctrine of election of remedies, is a "procedural rule which precludes one to whom there are available two inconsistent remedies from pursuing both. Its purpose is not to prevent recourse to alternative remedies, but to prevent double redress for a single injury." *Riverview Cooperative, Inc v First Nat'l Bank & Trust Co*, 417 Mich 307, 311–312; 337 NW2d 225 (1983) (internal citation omitted). The elements of the doctrine are "(1) *The existence of two or more remedies*; (2) *the inconsistency between such remedies*; and (3) *a choice of one of them*. If any one of these elements is absent, the result of preclusion does not follow." *Id.* at 313, quoting *Ielmini v Bessemer National Bank*, 298 Mich 59, 66–67; 298 NW 404 (1941), quoting 18 Am Jur, Election of Remedies, § 9, pp 132–133) (emphasis in original). Petitioner had the choice to accept disbursements under the Trust and therefore, acquiesce to the validity of the Trust, or not accept

disbursements and challenge the Trust. “For one proceeding to be a bar to another for inconsistency, the remedies must proceed from opposite and irreconcilable claims of right and must be so inconsistent that a party could not logically assume to follow one without renouncing the other. Two modes of redress are inconsistent if the assertion of one involves the negation or repudiation of the other.” *Prod Finishing Corp v Shields*, 158 Mich App 479, 494–495; 405 NW2d 171 (1987) (citation omitted). Petitioner could not accept disbursements from the Trust and question its validity at the same time.

Petitioner argues that fraud committed by the Trustee, in the form of undue influence, concealment, negligence and malfeasance, invoked an exception to the doctrine of election that vitiated the doctrine’s bar to his claims. This contention was unsupported by not only the trial record but by petitioner’s own actions. Petitioner argues that he was not able to discover any fraud on behalf of the trustee until almost three years later because the trustee refused to deliver documents to him that would have proved the fraud. The trial record however, evidenced otherwise. Petitioner received seven disbursements over a two year period totaling \$177,032.27. He accepted each disbursement without challenge. In June 2007, petitioner received a copy of a portion of the Trust and voiced no concerns. In June 2008, petitioner received a detailed final accounting and did not challenge it. Lastly, petitioner failed to appear, to object or seek any documentation at the court’s hearing on the Trustee’s Petition to Allow Trustee to Make In-Kind Distributions. Also, petitioner’s factual witness to his allegations of Trustee fraud, accountant Diebolt, was available during the entire three year period and not concealed from petitioner.

More importantly, petitioner did not act in conformity with challenging the validity of the Trust because he did not tender one penny back to the court from the Trust disbursements he received. While, there was arguably no obligation to tender back funds before the point where petitioner became aware of alleged fraud, petitioner, once he determined to challenge the Trust, was required to tender back the benefits he received from it. *In re Beglinger Trust*, 221 Mich at 279. In this matter, there was no dispute that petitioner failed to tender the amounts distributed to him to the court as required by *In re Beglinger Trust*. *Id.* A prerequisite of the fraud and deception exception is that the beneficiary must tender his distributed share to the court. *Id.* Petitioner failed to meet this requirement; hence, his claims were barred by this principal.

Petitioner also argues that the court abused its discretion when it denied his Motion for Reconsideration. We disagree. A motion for reconsideration will not be granted when it “merely presents the same issues ruled on by the court, either expressly or by reasonable implication.” MCR 2.119(F). In his motion, petitioner again argued the issue of undue influence as an exception to the bar of the doctrine of election. However, the fact that petitioner disagreed with the impact of a legal or equitable bar to a claim, did not change its impact, unfortunately. The court did not abuse its discretion in determining that the doctrine of election was still a bar to petitioner’s claims.

III. ATTORNEY FEES

Petitioner also contends that the trial court abused its discretion in awarding attorney fees to respondent and erred in awarding an amount that was unreasonable. Further, that the trial court abused its discretion in denying petitioner reconsideration of these issues. We disagree.

The decision whether to award attorney fees and the determination of the reasonableness of the fees are within the trial court’s discretion and will be reviewed on appeal for an abuse of discretion. *In re Temple Marital Trust*, 278 Mich App 122, 128; 748 NW2d 265 (2008); *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). An abuse of discretion occurs when the

decision was outside the range of reasonable and principled outcomes. *Smith*, 481 Mich at 526. The findings of fact underlying an award of attorney fees are reviewed for clear error, *Brown v Home Owners Ins Co*, 298 Mich App 678, 690; 828 NW2d 400 (2012), while underlying questions of law are reviewed de novo, *Loutts v Loutts*, 298 Mich App 21, 24; 826 NW2d 152 (2012). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with a definite and firm conviction that a mistake was made. *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 296; 769 NW2d 234 (2009). This Court reviews a trial court's decision to deny a motion for reconsideration for an abuse of discretion. *Churchman v Rickerson*, 240 Mich App 223; 611 NW2d 333 (2000).

Generally, attorney fees are not recoverable unless expressly allowed by statute or court rule. *In re Waters Drain Drainage Dist*, 296 Mich App 214, 217; 818 NW2d 478 (2012). In the instant case, the trial court cited MCL 600.2591, MCR 2.625(A)(2) and MCR 2.114(E) as its authority to grant respondent attorney fees.

MCL 600.2591 states:

(1) Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney.

* * *

(3) As used in this section:

(a) "Frivolous" means that at least 1 of the following conditions is met:

- (i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
- (ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
- (iii) The party's legal position was devoid of arguable legal merit.

The Michigan Court Rules likewise state that "if the court finds on motion of a party that an action or defense was frivolous, costs shall be awarded as provided by MCL 600.2591." MCR 2.625(A)(2). Additionally, that the signature of an attorney evidences that the attorney has read the document signed and "to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law." MCR 2.114(D)(2). Failure to perform the function in MCR 2.114(D)(2) is grounds for the court to impose sanctions. MCR 2.114(E).

To determine whether sanctions are appropriate under MCL 600.2591, it is necessary to evaluate the claims or defenses at issue at the time they were made. *In re Attorney Fees & Costs*, 233 Mich App 694, 702; 593 NW2d 589 (1999). The factual determination by the trial court depends on the particular facts and circumstances of the claim involved. *Dillon v DeNooyer Chevrolet Geo*, 217 Mich App 163, 169, 550 NW2d 846 (1996).

In consideration of the procedural background of the instant case, respondent initially raised the doctrine of estoppel as an affirmative defense in his response to the Amended Response to the Removal Petition, and later refined that argument to include the doctrine of election in his Amended Response to the Amended Petition. Once those affirmative defenses were raised, petitioner was on notice and should have exercised diligence in proceeding with his claim. Pursuant to MCR 2.114(D), petitioner had an affirmative duty to conduct a reasonable inquiry into the legal ramifications of the doctrine of elections. It was not an abuse of discretion for the court to award attorney fees based on petitioner's continued litigation of defenses that were barred and factually unsupported. This conclusion applies similarly to the court's actions on reconsideration. It is however, unclear from the trial record whether the court determined the procedural point in time when petitioner's claims became frivolous. Once that time is determined, attorney fees should be calculated henceforth.

Petitioner further argues that the trial court erred by awarding attorney fees that were unreasonable. We decline to address the issue of reasonable attorney fees in light of our decision to remand with the understanding that the amount of fees may change or that petitioner and respondent might reach an agreement as to what is reasonable.

We affirm the orders of the trial court granting summary disposition to respondent based on the doctrine of election. We further affirm the trial court's order awarding attorney fees, but remand the case for clarification and a redetermination consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh

/s/ Cynthia Diane Stephens